No. 10-1218

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

VANESSA SIMMONDS,

Petitioner,

v.

CREDIT SUISSE SECURITIES (USA) LLC, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOVING ISSUER RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit properly held that Petitioner's statutorily mandated pre-suit demand letters were inadequate given that the letters failed to identify the wrongdoing allegedly perpetrated and the legal action Petitioner wanted the Moving Issuers' boards to take on the respective corporation's behalf.[1]

2. Whether the Ninth Circuit properly rejected Petitioner's argument that demand should be excused as futile given that a shareholder may not invoke the demand futility exception after submitting a demand to the board.

3. Whether the Ninth Circuit properly converted dismissal of Petitioner's claims from without prejudice to with prejudice given that the actual pre-suit demand letters were considered by the court and found to be inadequate, and thus any amendment would be futile.

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, the undersigned counsel submits the Corporate Disclosure Statement for the Moving Issuer Respondents set forth below:

Akamai Technologies, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Ariba, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

AsiaInfo-Linkage, Inc., formerly known as AsiaInfo Holdings, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

Aspect Medical Systems, Inc. is a wholly owned subsidiary of Covidien PLC, a publicly held company.

Audible, Inc. is a wholly owned subsidiary of Amazon.com, Inc., a publicly held company.

Capstone Turbine Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

CoSine Communications, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

L-1 Secure Credentialing, Inc., formerly known as Digimarc Corporation, is a wholly owned subsidiary of L-1 Identity Solutions Operating Company, which is a

subsidiary of L-1 Identity Solutions, Inc., a publicly traded company ("L-1"). On September 20, 2010, L-1 publicly announced it had entered into an agreement under which Safran, a French company, will acquire L-1 following the sale of L-1's government/intelligence services business to BAE Systems. In February 2011, L-1 consummated the sale of the stock and membership interests of the entities comprising the L-1 Intel Business to BAE Systems. The acquisition by Safran is subject to a number of conditions, including, but not limited to, prior review by the U.S. Committee on Foreign Investment in the United States (CFIUS). In connection with the pending acquisition of L-1 by Safran SA, the CFIUS informed L-1 on May 4, 2011 that it had accepted the refiled joint notification which provides additional time to negotiate the terms of a definitive mitigation agreement. This acceptance commenced a new 30-day review period scheduled to expire on June 2, 2011. L-1 expects the parties to work diligently in an effort to finalize the agreement as quickly as practicable; however, there can be no assurance that a definitive mitigation agreement will be executed. L-1 expects the closing of the acquisition to occur within 30 to 40 days from the May 4, 2011 acceptance by CFIUS of the refiling of the joint notification. The closing is subject to the timing and successful completion of the CFIUS process and assumes satisfaction or waiver of all other applicable conditions.

Finisar Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

InterNAP Network Services Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

Intersil Corporation has no parent corporation. There are only two publicly traded companies that own 10% or more of Intersil Corporation's common stock, namely, T. Rowe Price Associates, Inc. and FMR L.L.C.

Martha Stewart Living Omnimedia, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Maxygen, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

NaviSite, Inc. was acquired by Time Warner Cable, Inc. on April 21, 2011. Time Warner Cable, Inc., a publicly traded company, is the sole shareholder of NaviSite, Inc.

On February 22, 2011, Occam Networks, Inc. was acquired by Calix, Inc., a publicly traded Delaware corporation. In the course of the acquisition (a "reverse-triangular merger"), Occam Networks, Inc. was merged into Occam Networks, LLC, with Occam Networks, LLC being the surviving entity. Occam Networks, LLC is a wholly owned subsidiary of Calix, Inc.

Onvia, Inc. has no parent corporation and no publicly held corporation currently owns 10% or more of its stock.

Openwave Systems, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Oplink Communications, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Packeteer, Inc. is a wholly owned subsidiary of Blue Coat Systems, Inc., a publicly held company.

Perot Systems Corporation is a wholly owned subsidiary of Dell, Inc., a publicly held company.

Priceline.com Incorporated has no parent corporation and no publicly held company owns 10% or more of its stock.

Red Hat, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Saba Software, Inc. has no parent corporation. The only publicly traded corporation that owns 10% or more of Saba Software, Inc.'s common stock is T. Rowe Price Associates, Inc.

Selectica, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Silicon Laboratories, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Soapstone Networks Inc., formerly known as Avici Systems, Inc., has no parent corporation and no publicly held corporation owns 10% or more of its stock. Soapstone Networks Inc. has been dissolved pursuant to Section 275 of the General Corporation Law of the State of Delaware by the filing of a Certificate of Dissolution with the Secretary of State of Delaware. The Certificate of Dissolution became effective July 31, 2009, and the period for winding up the affairs of Soapstone Networks Inc. thereupon began.

Sonus Networks, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Sycamore Networks, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

TheStreet.com, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

TiVo Inc. has no parent corporation. The only publicly traded corporation that owns 10% or more of TiVo Inc.'s common stock is Blackrock, Inc.

On July 21, 2009, Open Text Corporation, a publicly traded Canadian corporation, acquired through an indirect wholly owned subsidiary all of the issued and outstanding common shares of Vignette Corporation.

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INTRODUCTION

There is no conflict among federal courts on any of the questions presented by Petitioner. Indeed, no other circuit court has addressed the substantive requirements of a pre-suit demand under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) ("Section 16(b)"). The Ninth Circuit faithfully applied this Court's instruction to determine "the contours of the demand requirement" by applying the law of the Moving Issuers' state of incorporation, here Delaware. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90 (1991). And, the Ninth Circuit's application of Delaware law to evaluate the content of Petitioner's Section 16(b) demand letters was plainly correct. Noting that Petitioner's demand letters make no reference to the transactions on which her complaints are based, Appendix to the Petition ("Appendix" or "Pet. App.") at 61a, the Ninth Circuit held that the demand letters are inadequate because they fail to identify the wrongdoing allegedly perpetrated and the legal action she wanted the boards to take. *Id.* at 59a. In these circumstances, there is no issue worthy of this Court's review.

Petitioner does not challenge the Ninth Circuit's conclusion that her demand letters are inadequate under Delaware law and explicitly acknowledges that "[n]o decision from this Court, or any circuit court before the Ninth Circuit decision, has ever addressed the requirements of a Section 16(b) pre-suit demand." Pet. at 17. Petitioner nevertheless hopes to obtain the Court's review by creating a conflict where none exists. In fact, her entire Petition is based on the false premise that the Ninth Circuit's decision "subjects Section 16(b) claims to

the procedural dictates of Rule 23.1" and thus conflicts with decisions of other circuit courts. *Id.* at 16. Contrary to Petitioner's assertion, the Ninth Circuit specifically refrained from deciding whether Rule 23.1 applies to Section 16(b) claims, because that issue was not relevant to its analysis. Pet. App. at 51a n.7. Petitioner's purported conflict is thus nonexistent and the Petition should be denied.

Petitioner also seeks review of the Ninth Circuit's rejection of her attempt to excuse the inadequate demand letters by arguing demand futility. Despite the unambiguous opinion of the Ninth Circuit, she again claims that the court erroneously "allowed Rule 23.1 to govern its analysis" and that this creates a circuit split worthy of review. Pet. at 28. As with the issue of adequacy of demand, Petitioner's attempt to obtain review based on this false conflict must be rejected.

Finally, Petitioner seeks review of the Ninth Circuit's decision to dismiss the cases involving the Moving Issuers with prejudice, rather than without prejudice. As the Ninth Circuit made clear, dismissal with prejudice is appropriate where amendment would be futile.

The Ninth Circuit's decision to affirm the district court's dismissal of Petitioner's complaints for failure to make an adequate demand was proper. And, Petitioner cannot show that the Ninth Circuit's decision regarding her demand letters is contrary to any prior decisions of this Court or those of any other circuit court. For these reasons and the reasons set forth below, the Petition should be denied.

COUNTER-STATEMENT OF THE CASE

I. THE POLICIES UNDERLYING SECTION 16(b)

Petitioner's complaints allege that the Underwriters[2] violated Section 16(b) by engaging in prohibited "short-swing" transactions in connection with the Initial Public Offerings (IPOs) of the fifty-four Issuers between 1999 and 2000. *See* 15 U.S.C. § 78p(b).

Congress specifically included a demand requirement in Section 16(b) and provided a sixty-day period during which a corporation's board has the opportunity to investigate and initiate suit, if appropriate. *Id.* (Section 16(b) suit may be brought by shareholder only "if the issuer shall fail or refuse to bring such suit within sixty days after request"). The policy behind the demand requirement "'is to assure that the stockholder affords the corporation the opportunity to address an alleged wrong without litigation, to decide whether to invest the resources of the corporation in litigation, and to control any litigation which does occur.'" Pet. App. at 54a (quoting *Spiegel v. Buntrock*, 571 A.2d 767, 773 (Del. 1990)); *see also Henss v. Schneider*, 132 F. Supp. 60, 62 (S.D.N.Y. 1955) ("The sixty day [demand] provision [in Section 16(b)] was enacted for the benefit of the corporation and to afford it a reasonable opportunity to assert and prosecute its claim in its own name for the recovery of profits from the insider."); *Colan v. Monumental Corp.*, 524 F. Supp. 1023, 1027 (N.D. Ill. 1981) (Section 16(b)'s demand requirement allows a corporation "to address shareholder complaints prior to resorting to judicial intervention.") (citation omitted).

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2. "Underwriters" refers to the Underwriter Defendants listed in the Petition at iii.

Section 16(b) is designed to protect investors, the market, and issuers themselves from abuses by corporate insiders' speculative short-swing trading based on inside information. *See Kern Cnty. Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 594-95 (1973). Because Section 16(b) applies harshly to hold statutorily defined insiders strictly liable for short-swing profits, this Court has narrowly construed Section 16(b)'s reach. *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232, 251-52 (1976) ("[Section 16(b)] imposes liability without fault within its narrowly drawn limits"). *See also Dreiling v. Am. Online Inc.*, 578 F.3d 995, 997, 1005 (9th Cir. 2009) (noting the "narrow interpretation generally given Section 16(b) by Congress and all judicial precedent thus far" and rejecting plaintiff's "novel theory of liability" which would impermissibly "expand Section 16(b) beyond its previously-established boundaries"). Section 16(b) "was not intended to remedy all wrongs" and "is simply not an antidote to all the ills that may plague the securities market." *Heublein, Inc. v. Gen. Cinema Corp.*, 722 F.2d 29, 31 (2d Cir. 1983).

II. BRIEF FACTUAL BACKGROUND

In July 2007 – eight years after the relevant IPOs described in the Petition – Petitioner sent so-called demand letters to the fifty-four Issuers' boards of directors. Pet. App. at 93a-94a. The nearly identical demand letters each describe the alleged wrongful acts and purported damages to be sought by the Issuers in a single paragraph:

> Notwithstanding the short-swing trading prohibition of Section 16, the group, through its members engaged in purchase and sales

> of company shares within periods of less than six months during [the one-year relevant period]. Additionally, despite the reporting requirements of Section 16(a), neither the group nor its members filed Section 16(a) reports for these purchase and sale transactions. The group members should therefore be compelled to disgorge the profits they made through the purchase and sale of Company Stock during [the one-year relevant period].

Id. at 97a. Of the fifty-four Issuers that received Petitioner's boilerplate demand letters, none brought suit. Pet. at 12.

In October 2007, Petitioner – who apparently acquired shares of the Issuers at the direction of her father, a securities attorney with experience in Section 16(b) litigation – filed fifty-four separate complaints alleging violations of Section 16(b). The complaints were "based on the same set of facts as presented in [*In re Initial Public Offering Securities Litigation*, No. 21 MC 92 (SAS) (S.D.N.Y.)]." Pet. App. at 85a; *see also id.* at 83a. In her complaints, Petitioner articulated a novel and complex theory of liability that bears no resemblance to the Section 16(b) claim contained in the demand letters. *See id.* at 61a. Specifically, Petitioner's complaints allege that the Underwriters violated Section 16(b) by engaging in the following alleged "Short-Swing Transactions": (1) sharing the profits of customers to whom they made IPO allocations; (2) allocating shares of the Issuers' stock to executives and other high-level insiders of other companies, from which the Underwriters expected to receive investment banking opportunities in return; and (3) creating opportunities for other members of the alleged group to profit from the sale of the Issuers' stock in return

for future banking opportunities. *Id.* at 45a-46a. None of these transactions are mentioned in the demand letters.

III. THE DISPOSITION BELOW

On July 25, 2008, the Moving Issuers jointly filed a motion to dismiss, arguing that Petitioner had failed to serve the Moving Issuers with adequate pre-suit demand letters and that her claims were time-barred. *Id.* at 46a-47a. The Underwriters filed a separate motion to dismiss, arguing that Petitioner's claims were time-barred, that her complaints failed to state a cause of action under Section 16(b), and that the Underwriters are protected by various exemptions from Section 16(b). *Id.* at 46a.

On March 12, 2009, the district court granted the Moving Issuers' Joint Motion to Dismiss, holding that Petitioner failed to serve adequate demand letters and thus lacked standing to pursue claims arising from the Moving Issuers' IPOs.[3] The district court correctly found that Petitioner's fifty-four nearly identical demand letters "do not describe the same alleged wrongdoing that she later describes in her complaints," which the court observed were based on a "complex and novel" theory of liability. *Id.* at 98a, 101a. Accordingly, the demand

3. The district court's opinion is reported at 602 F. Supp. 2d 1202, and reprinted in the Appendix at 79a-113a. The district court did not reach the Moving Issuers' argument that Petitioner's claims are barred by the two-year statute of limitations. The district court did, however, reach the limitations issue in ruling on the Underwriters' motion to dismiss, holding that the claims against the Underwriters based on the Non-Moving Issuers' IPOs are time-barred. *Id.* at 105a-111a.

letters "did not put the Issuer Defendants on notice that [Petitioner] was demanding that the corporation compel the Underwriter Defendants to disgorge profits they earned when customers to whom they allocated IPO shares sold such shares in the aftermarket." *Id.* at 98a. In short, "nothing in the demand letters sent to the Issuer Defendants, nor in any of the follow-up letters, explains [Petitioner's] multi-layered theory of recovery of profits from short-swing trades." *Id.* at 101a. The district court concluded that the claims were "premised upon mere suspicion," "based almost entirely on conjecture," and were not of the type that "would further the congressional intent of [Section 16(b)]." *Id.* at 98a n.13, 99a, 110a. The court also rejected Petitioner's attempt to excuse her inadequate demand letters by arguing demand futility. *Id.* at 102a-103a.

On appeal, the Ninth Circuit affirmed the district court's ruling that Petitioner's demand letters are insufficient because none of the transactions on which Petitioner bases her complaints are "referenced in any way" in her demand letters. *Id.* at 61a, 64a.[4] Specifically, Petitioner's "demand letters claimed that the Underwriters

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4. The Ninth Circuit's opinion, as amended by the order denying the petitions for rehearing en banc, is reported at __ F.3d __, 2011 WL 135693, and is reprinted in the Appendix at 1a-78a. The Ninth Circuit reversed the district court's holding that Petitioner's claims are barred by the applicable statute of limitations. On April 15, 2011, the Underwriters filed a petition for writ of certiorari with the Court on this issue in those cases involving the Non-Moving Issuers' IPOs (No. 10-1261). Because the Ninth Circuit did not reach the statute of limitations in the cases involving the Moving Issuers' IPOs, those cases are not part of Underwriters' petition.

directly bought and sold the Issuing Companies' shares, and accordingly requested that the Issuing Companies seek disgorgement of the Underwriters' trading profits," while her complaints seek the disgorgement of indirect profits that the Underwriters received from "their *customers'* purchases and sales of the Issuing Companies' shares." *Id.* at 60a-61a (emphasis in original). Simply put, "[t]he garden-variety Section 16(b) claim made out in these demand letters bears no resemblance to the elaborate scheme described in [Petitioner's] Complaints." *Id.* at 61a.

The Ninth Circuit, like the district court, also rejected Petitioner's argument that "the demand requirement should be excused as futile," ruling that "shareholders may not invoke the futility exception after submitting a demand to the board." *Id.* at 64a (citing *FLI Deep Marine LLC v. McKim*, C.A. No. 4138-VCN, 2009 WL 1204363, at *3 n.17 (Del. Ch. Apr. 21, 2009)). In concluding, the Ninth Circuit held that Petitioner "is barred from relitigating issues relating to the adequacy of the demand letters," which were "litigated fully on the merits," and instructed the district court to dismiss the cases involving the Moving Issuers' IPOs with prejudice. Pet. App. at 71a.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT'S DECISION REGARDING PETITIONER'S INADEQUATE DEMAND LETTERS WAS PROPER AND DOES NOT CONFLICT WITH ANY OTHER DECISION.

A. The Ninth Circuit Is the Only Circuit that Has Addressed the Substantive Requirements of a Section 16(b) Demand Letter.

There is no circuit split on any issue presented in the Petition, including the required contents of a Section 16(b) demand letter, thus the Petition should be denied. Petitioner concedes, as she must, that "[n]o decision from this Court, or any circuit court before the Ninth Circuit decision, has ever addressed the requirements of a Section 16(b) pre-suit demand when the insiders have failed to comply with Section 16(a)." Pet. at 17. In fact, no circuit court prior to the Ninth Circuit has ever addressed the requirements of a Section 16(b) demand letter in any context.[5] By definition, then, the Ninth Circuit's decision cannot conflict with the law of any other circuit.

Dissatisfied that both the Ninth Circuit and the district court found her demand letters inadequate, Petitioner now hopes to obtain this Court's review

5. Moving Issuers are aware of only one district court opinion (aside from the opinion below) that addresses the substantive requirements of a Section 16(b) demand letter. *See Dreiling v. Am. Express Travel Related Servs.*, 351 F. Supp. 2d 1077, 1085 (W.D. Wash. 2004) (applying law of state of incorporation to evaluate sufficiency of demand letter), *rev'd on other grounds*, 458 F.3d 942 (9th Cir. 2006).

by manufacturing a circuit split out of whole cloth. Specifically, Petitioner claims that "the Ninth Circuit decision subjects Section 16(b) to the procedural dictates of Rule 23.1" in contravention of decisions from other circuit courts which have held that Rule 23.1 does not apply to Section 16(b) claims. *Id.* at 16. Petitioner's assertion misrepresents the Ninth Circuit's holding, in which the court explicitly refrained from deciding whether Rule 23.1 applies to Section 16(b) actions. Pet. App. at 51a n.7. Rather, the Ninth Circuit relied on substantive state law to evaluate the sufficiency of Petitioner's demand letters. *Id.* at 51a-52a (citing *Kamen*, 500 U.S. at 108). Accordingly, Petitioner's cases – none of which address the sufficiency of a Section 16(b) demand or the propriety of looking to state law for the required substance of a Section 16(b) demand letter – in no way conflict with the Ninth Circuit's decision. *See* Section D, *infra*.

B. The Ninth Circuit's Application of *Kamen* Was Proper.

The Ninth Circuit appropriately followed the principles set forth in *Kamen*, 500 U.S. 90, in evaluating the substance of Petitioner's demand letters. In *Kamen*, the Court considered whether it "should fashion a federal common law rule obliging the representative shareholder in a derivative action founded on the Investment Company Act of 1940 to make a demand on the board of directors even when such a demand would be excused as futile under state law." *Id.* at 92 (citation omitted). In answering this question, the Court observed that although Rule 23.1 sets forth pleading requirements, it "does not *create* a demand requirement of any particular dimension." *Id.* at 96 (emphasis in original). Rather, "the function of the

demand doctrine in delimiting the respective powers of the individual shareholder and of the directors to control corporate litigation clearly is a matter of 'substance,' not 'procedure.'" *Id.* at 96-97. Thus, it was necessary to "identify the source and content of the substantive law that defines the demand requirement." *Id.* at 97.

Reaffirming the teaching from its earlier decision, *Burks v. Lasker*, 441 U.S. 471 (1979),[6] the Court explained: "[W]here a gap in the federal securities laws must be bridged by a rule that bears on the allocation of governing powers within the corporation, federal courts should incorporate *state* law into federal common law unless the particular state law is inconsistent with the policies underlying the federal statute." *Kamen*, 500 U.S. at 108 (emphasis in original). Applying this principle, the Court held that "the contours of the demand requirement," including the standards governing demand futility, must be determined by the law of the state of incorporation. *Id.* at 101.

As the Ninth Circuit held, this case fits squarely within the holding of *Kamen*. Section 16(b) requires a shareholder to make a demand on a corporation's board of directors and to wait sixty days before she is permitted to sue, 15 U.S.C. § 78p(b), but "does not set forth any

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6. In *Burks*, the Court stated that "'[c]orporations are creatures of state law,' and it is state law which is the font of corporate directors' powers." 441 U.S. at 478 (citation omitted). Federal legislation "is generally enacted against the background of existing state law; Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute." *Id.* (citations omitted).

additional details regarding the nature and scope of this statutory demand requirement." Pet. App. at 51a. In light of this silence, the Ninth Circuit turned to the law of Delaware – the state of incorporation for each Moving Issuer – to ascertain the substantive requirements for a pre-suit demand. *Id.* at 51a-52a (citing *Kamen*, 500 U.S. at 108).

Under Delaware law, a pre-suit demand letter must "'specifically state (i) the identity of the alleged wrongdoers, (ii) the wrongdoing they allegedly perpetrated and the resultant injury to the corporation, and (iii) the legal action the shareholder wants the board to take on the corporation's behalf.'"[7] Pet. App. at 55a (quoting *Yaw v. Talley*, Civ.A. No. 12882, 1994 WL 89019, at *7 (Del. Ch. Mar. 2, 1994). Applying this standard, the Ninth Circuit correctly held that Petitioner's demand letters were inadequate because they failed to identify "'the wrongdoing . . . allegedly perpetrated'" and "'the legal action the shareholder wants the board to take on the corporations' behalf.'" Pet. App. at 59a (quoting *Yaw*, 1994 WL 89019, at *7). Likewise, the follow-up letters that Petitioner sent to twenty-five of the Issuers "completely failed to provide sufficiently detailed information to permit the boards to conduct a good faith inquiry into the alleged wrongdoing." Pet. App. at 61a-62a.

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7. However, the Ninth Circuit explained that, in the Section 16(b) context, "a shareholder's demand need not identify any corporate injury in order to satisfy the demand requirement" because "this requirement 'frustrate[s] specific objectives' of Section 16(b) by adding an additional element to the Section 16(b) cause of action." Pet. App. at 60a n.18 (quoting *Kamen*, 500 U.S. at 98).

C. Petitioner's Arguments Regarding *Kamen* and Delaware's Pre-Suit Demand Standard Are Unavailing.

Petitioner does not challenge the Ninth Circuit's conclusion that her demand letters are insufficient under Delaware's pre-suit demand standard. Rather, Petitioner contends that the Ninth Circuit erred by following *Kamen* and incorporating the substantive demand requirements applied in traditional derivative actions because, she argues, "Rule 23.1 demands differ materially from Section 16(b) demands in at least two respects." Pet. at 18-19.

First, Petitioner claims that "in a Rule 23.1 suit, the pre-suit demand is meant to 'afford the directors an opportunity to exercise their reasonable business judgment,'" whereas in a Section 16(b) suit, the "business judgment of an issuer's board is irrelevant." *Id.* at 19 (citations omitted). Yet Petitioner blatantly ignores that the Ninth Circuit considered the differences between Section 16(b) cases and traditional derivative cases and also noted the similarities in the policies underlying the demand requirements. Pet. App. at 54a-56a.

The Ninth Circuit emphasized the primary policy underlying the pre-suit demand requirement: "'[T]o assure that the stockholder affords the corporation the *opportunity* to address an alleged wrong without litigation, to decide whether to invest the resources of the corporation in litigation, and to control any litigation which does occur.'" *Id.* at 54a (quoting *Spiegel*, 571 A.2d at 773 (emphasis added)). This policy is served by the demand requirement in both the Rule 23.1 and Section 16(b) contexts. *See supra* at 3-4 (citing *Henss*, 132 F. Supp. at 62; *Colan*, 524 F. Supp. at 1027).

The proceeding policy would be frustrated if, as here, a shareholder could file and control a Section 16(b) lawsuit after submitting a *pro forma* demand letter that makes no mention of the alleged short-swing transactions or legal theory she intends to pursue. *See* Pet. App. at 61a (wrongdoing and transactions alleged in Petitioner's complaints are not referenced in her demand letters); *see also id.* at 63a ("were we to adopt Simmonds's proposed approach, Delaware's demand standard would be eviscerated"). While the business judgment rule may not shield the board's refusal to act on an adequate Section 16(b) demand letter, the board must still be given the opportunity to investigate and pursue the claim in the first instance. *See Grossman v. Johnson*, 674 F.2d 115, 120 (1st Cir. 1982) ("If anything, that special demand provision [in Section 16(b)] indicates that Congress considered a demand essential for a shareholder suit even though Congress may have dispensed with other aspects of what is now Rule 23.1.").[8] Thus, Petitioner's argument provides no justification for this Court's review.

Second, Petitioner claims, for the first time, that *Kamen* was misapplied because Section 16(b) "states the demand requirement explicitly in the statute," and

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8. As explained by the Ninth Circuit, the "demand rule 'is not merely a technical or unimportant requirement,'" and is "particularly relevant in the Section 16(b) context." Pet. App. at 55a (quoting *Potter v. Hughes*, 546 F.3d 1051, 1058 (9th Cir. 2008)). "'Anecdotal evidence suggests that well over 90 percent of all Section 16(b) claims are settled privately without any lawsuit being filed,'" but this figure most certainly would be lower if boards were not afforded the opportunity to address allegations of short-swing trading. Pet. App. at 55a (quoting Peter Romeo & Alan Dye, *Section 16 Treatise and Reporting Guide* § 9.01 [7][c] (3d ed. 2008)).

thus there is no gap to bridge. Pet. at 20. Yet Petitioner acknowledges that "Section 16(b) does not set out any requirements for the demand itself." *Id.* at 4. In acknowledging the statute's silence, Petitioner advocates for deriving the substantive requirements for a pre-suit demand letter from a treatise's summary of what "usually will" be contained in a demand letter in a typical Section 16(b) case. *Id.* at 17 (citing Peter Romeo & Alan Dye, *Section 16 Treatise and Reporting Guide* § 9.02[4] (3d ed. 2008)). But Romeo & Dye does not even purport to set out the "requirements" for Section 16(b) demand letters. Nor does Petitioner cite any case law holding that courts should incorporate a treatise, as opposed to state law, into federal common law to bridge a gap in the federal securities laws. In any event, the *pro forma* demand letter requirements for which Petitioner claims to find support in a treatise would be a particularly poor fit for the novel and complex theory of liability on which her complaints are based. *See* Section F, *infra*.

D. Rule 23.1's "Procedural Dictates" Were Irrelevant to the Ninth Circuit's Decision.

Petitioner also claims that the Ninth Circuit "[i]mpos[ed] heightened procedural rules" and "subject[ed] Section 16(b) to the procedural dictates of Rule 23.1." Pet. at 16, 19. This argument is patently false and conflates Rule 23.1's procedural requirements and the substantive requirements of a pre-suit demand under Delaware law, which are two separate and distinct concepts. *See* Section B, *supra*; *see also Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 543 (1984) (Stevens, J., concurring) ("Rule 23.1 is not the source of [the demand] requirement"). The Ninth Circuit did not hold (and Moving Issuers have never argued) that Rule 23.1 applies to Section 16(b)

claims or otherwise controls the substance of a Section 16(b) demand letter. *See* Pet. App. at 51a n.7 ("[T]wo of our sister circuits have suggested that Rule 23.1 does not apply in Section 16(b) actions. . . . We refrain from deciding this question because it is not relevant to our analysis") (citations omitted).

Despite Petitioner's complaint that the Ninth Circuit "relied on Rule 23.1 cases to conclude that Petitioner's demands were not sufficient," Pet. at 21, the court did not rely on those cases for their application of Rule 23.1 or its state counterpart. Rather, the decisions were relevant to the Ninth Circuit's opinion only in that they set forth substantive Delaware law governing the contents of a pre-suit demand letter. Pet. App. at 55a-56a, 56a n.13 (citing *FLI*, 2009 WL 1204363, at *1 n.6 (setting forth Delaware's substantive requirements for a pre-suit demand letter); *Khanna v. McMinn*, No. Civ.A. 20545-NC, 2006 WL 1388744, at *13 (Del. Ch. May 9, 2006) (same); *Gatz v. Ponsoldt*, No. Civ.A. 174-N, 2004 WL 3029868, at *5 (Del. Ch. Nov. 5, 2004) (same); *Yaw*, 1994 WL 8909, at *7 (same)). *See* Section C, *supra*.

The Ninth Circuit's decision, therefore, does not conflict with any of the circuit court decisions cited by Petitioner. Petitioner's cases do not address the content of a Section 16(b) demand letter, let alone suggest that the Ninth Circuit was wrong when it turned to state law – not Rule 23.1 – to determine the required contents of such a letter. *See* Pet. at 22-24 (citing *Blau v. Mission Corp.*, 212 F.2d 77, 79 (2d Cir. 1954) (compliance with Rule 23.1's requirement that a shareholder plead contemporaneous ownership is not required for Section 16(b) claims); *Dottenheim v. Murchison*, 227 F.2d 737 (5th Cir. 1956)

(same); *Grossman*, 674 F.2d at 120 (in deciding whether Rule 23.1 applies to Section 36(b) claims under Investment Company Act, court rejected analogy between Section 36(b) and Section 16(b) because the latter contains its own express demand requirement); *Cramer v. Gen. Tel. & Elec. Corp*, 582 F.2d 259, 276 (3d Cir. 1978) (business judgment rule inapplicable in Section 16(b) context)).[9] Petitioner's attempt to fabricate a conflict should be rejected.

E. The Ninth Circuit's Decision Does Not Reward Insiders or Impede Congressional Intent.

Petitioner argues that the Ninth Circuit's decision will impede the enforcement scheme Congress designed because without a Section 16(a) report, no outsider has access to information required by the Ninth Circuit's decision. Pet. at 10. Petitioner is wrong. The information the Ninth Circuit held was missing from Petitioner's demand letters – the "'wrongdoing . . . allegedly perpetrated'" and "'the legal action the shareholder wants the board to take on the corporation's behalf'" – would not have been reflected in the Section 16(a) reports that Petitioner claims should have been filed. Pet. App. at 59a (citation omitted);

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9. For the same reasons, there is no conflict between the Ninth Circuit's decision and either of the district court decisions cited by Petitioner. *See* Pet. at 23-24 (citing *Segen v. Comvest Venture Partners, LP*, No. Civ.A. 04-822-JJF, 2005 WL 1320875, at *4 (D. Del. June 2, 2005) (business judgment rule inapplicable in Section 16(b) context); *DiLorenzo v. Edgar*, No. Civ. 03-841-SLR, 2004 WL 609374, at *3 (D. Del. Mar. 24, 2004) (noting business judgment rule and Rule 23.1's pleading requirement of contemporaneous ownership do not apply to Section 16(b) claims)). *See also infra* at 24 (purported conflict with district court does not warrant review by this Court).

see id. at 61a. Under Petitioner's theory of liability, the persons who made the challenged purchases and sales are not statutory insiders, officers, directors and major shareholders whose trades would appear on Section 16(a) reports, but rather *customers of the Underwriters*. *See id.* ("According to the Complaints, the Underwriters violated Section 16(b) when they profited indirectly through their *customers*' purchases and sales of the Issuing Companies' shares") (emphasis in original). Nor would a Section 16(a) report reflect the indirect "profits the Underwriters received through their investment banking operations," which Petitioner seeks to disgorge in her complaints.[10] *See id.* at 60a. It is telling that Petitioner was able to bring her complaints despite the fact that no Section 16(a) reports have ever been filed.

The requirement that a pre-suit demand letter contain certain basic information to allow a corporation the fair opportunity to act does not "reward insiders" or in any way hinder a shareholder's ability to proceed with the suit once she has served a proper demand letter and the sixty-day period expires. Instead, a standard requiring sufficient information is necessary to protect the rights afforded issuers by Section 16(b)'s demand requirement. After making a sufficient demand, a shareholder is free to pursue a Section 16(b) claim if the board declines to do so. *See, e.g., Henss*, 132 F. Supp. at 62.

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10. Even according to Petitioner, Section 16(a) reports are only required to set forth "the short swing trading details, identify the insiders and group members, specify the shares in which the insiders have or share a pecuniary interest, and permit the computation of the profits to be disgorged." Pet. at 25.

Petitioner also claims that the Ninth Circuit's decision to permit the Underwriters to challenge the adequacy of the pre-suit demand letters through a motion to dismiss is contrary to congressional intent. Pet. at ii, 26-27; *see also* Pet. App. at 71a n.22. Petitioner, however, has identified no circuit cases in conflict with the Ninth Circuit's holding; thus this issue does not warrant review by this Court. *See* Supreme Court Rule 10.

F. The Ninth Circuit's Demand Ruling Presents No Issue of Widespread Application that Warrants the Court's Attention.

While application of Section 16(b)'s statute of limitations has generated a significant division among the circuits with far reaching implications, *see* Underwriters' petition for writ of certiorari, No. 1261, the scope of Section 16(b)'s demand requirements has not. Thus, Petitioner not only fails to identify a conflict, she also fails to identify an issue of widespread application worthy of the Court's review.

In a typical Section 16(b) action, a shareholder demands disgorgement of short-swing profits in company stock from corporate insiders; thus the sufficiency of the shareholder's demand letter is rarely at issue. Petitioner, however, seeks disgorgement from Underwriters of profits earned "*indirectly* through their *customers*' purchases and sales of the Issuing Companies' shares." Pet. App. at 61a (emphasis in original). Because Petitioner's demand letters vaguely describe "a garden-variety Section 16(b) claim" that "bears no resemblance to the elaborate scheme" alleged in her complaints, *id.*, the adequacy of Petitioner's demand letters was unusually important in

this case. Thus, the district court and the Ninth Circuit were required to ascertain and apply the applicable standard for evaluating the contents of those letters. For these reasons, Petitioner's challenge to the Ninth Circuit's analysis of her demand letters does not involve an issue of widespread application to which this Court should devote its resources.

II. THE NINTH CIRCUIT'S DECISION REGARDING DEMAND FUTILITY WAS PROPER AND DOES NOT CONFLICT WITH ANY OTHER DECISION.

The Ninth Circuit properly rejected Petitioner's attempt to excuse her inadequate demand letters by arguing demand futility. Petitioner attempts to manufacture a conflict by arguing that the "Ninth Circuit erred in its brief analysis of demand futility because, again, it allowed Rule 23.1 to govern its analysis." Pet. at 28. As with the issue of adequacy of demand, Petitioner's purported conflict is illusory. As its decision reflects, the Ninth Circuit did not apply Rule 23.1, which "speaks only to the adequacy of the shareholder representative's pleadings." *Kamen*, 500 U.S. at 96; *see also* Section A, *supra*. Instead, the Ninth Circuit properly considered law from the Moving Issuers' state of incorporation, Delaware, in addressing Plaintiff's unpled arguments regarding demand futility and waiver. *See* Section B, *supra*; *see also* Pet. App. at 52a (citing *Kamen*, 500 U.S. at 108).[11]

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11. It is important to note that Petitioner does not allege demand futility in her complaints; she raised demand futility for the first time in her Opposition Brief before the district court. *See Henss*, 132 F. Supp. at 62-63 (dismissing Section 16(b) action where shareholders *failed to allege* facts to justify filing suit before 60 day period expired); *Coran v. Snap-on Tools Corp.*, 408 F. Supp.

Petitioner's only retort is that substantive law from Delaware is inapplicable because the business judgment rule does not apply to Section 16(b) claims, Pet. at 28-29, a point acknowledged in the Ninth Circuit's opinion, Pet. App. at 54a n.9. Unlike the Ninth Circuit, however, Petitioner ignores that the demand requirement in both 16(b) and Delaware derivative cases provides a corporation with the *opportunity* to evaluate a demand and initiate suit on its own. *See* Section C, *supra*. In both contexts, a shareholder who makes a demand waives the argument of demand futility, because the law will not presume that parties act in a meaningless way – that they undertook futile actions. *See, e.g., Spiegel*, 571 A.2d at 775. By making her demands, Petitioner waived any argument that the Moving Issuers' boards were incapable of properly considering the respective demands and should have been deprived of this opportunity. *Levner v. Saud*, 903 F. Supp. 452, 457 (S.D.N.Y. 1994).

There is no conflict or inconsistency between the Ninth Circuit's decision and the cases cited by Petitioner for the proposition that Rule 23.1 does not apply to Section 16(b)

1060, 1061 (E.D. Wis. 1976) (Section 16(b) demand only excused where demand futility facts "then known" to plaintiff are alleged in complaint). And, while Petitioner claims she has "demonstrated demand futility" in her briefs, Pet. at 27, she apparently bases this conclusion on the fact that Moving Issuers challenged the adequacy of the demand letters – a right to which they are entitled under 16(b) precedent, as Petitioner acknowledges. *Id.* at 26. Moving Issuers' request to terminate the actions with prejudice also cannot demonstrate futility, *id.* at 27, because Petitioner concedes that dismissal on statute of limitations grounds (an argument Moving Issuers presented in the district court and on appeal) "should result in dismissal with prejudice." *Id.* at 30 n.10.

claims, and regardless, all of the cases cited by Petitioner are factually inapposite. *See* Pet. at 29. In *Pellegrino v. Nesbit*, 203 F.2d 463 (9th Cir. 1953), for example, the court did not address demand futility; rather, the language Petitioner quotes is from the court's discussion of whether an appellant can *intervene*, as a matter of right. Pet. at 29 (citing *Pellegrino*, 203 F.2d at 466-67). The fact that a shareholder may be entitled to intervene in an issuer's Section 16(b) suit does not alter the legal principle that demand futility is judged *at the time the complaint is filed*, not based on hindsight. *See Rothenberg v. United Brands Co.*, No. 74 Civ. 5735, 1977 WL 1014, at *3 (S.D.N.Y. May 11, 1977), *aff'd*, 573 F.2d 1295 (2d Cir. 1977); Romeo & Dye, § 9.03[2][b][iii] (demand futility in a §16(b) case "is measured as of the date the complaint is filed"). Here, the Moving Issuers never had the opportunity to evaluate whether they should file suit because Petitioner failed to serve adequate demand letters – a fact Petitioner repeatedly ignores. Thus, this case has no relationship to those where a company brought suit but later failed to prosecute.

Petitioner's other cases fare no better. The only other circuit court decision cited by Petitioner, *Mendell v. Gollust*, 909 F.2d 724 (2d Cir. 1990), *aff'd*, 501 U.S. 115 (1991), addressed whether the plaintiff had standing after a corporate merger, not demand futility. The remaining two cases upon which Petitioner relies are district court opinions that do not give rise to a cognizable conflict within the meaning of Supreme Court Rule 10 and, in any event, are inapposite. *See* Pet. at 29 (citing *Segen v. Comvest Venture Partners, LP*, No. Civ.A. 04-822-JJF, 2005 WL 1320875, at *2 (D. Del. June 2, 2005) (addressing an adequate demand that was wrongfully refused, not demand futility) and *DiLorenzo v. Edgar*,

No. Civ. 03-841-SLR, 2004 WL 609374, at *4 (D. Del. Mar. 24, 2004) (plaintiff specifically pled demand futility in his complaint)). The Ninth Circuit's rejection of Petitioner's demand futility argument was proper and her Petition should be denied.

III. THE NINTH CIRCUIT'S DECISION REGARDING DISMISSAL WITH PREJUDICE WAS PROPER AND DOES NOT CONFLICT WITH ANY OTHER DECISION.

The Ninth Circuit properly held that Petitioner's claims should be dismissed with prejudice, and Petitioner fails to identify any conflict or other justification to grant her Petition on this issue.[12] Petitioner argues that the Ninth Circuit's decision to dismiss the cases with prejudice (i) conflicts with the view that courts should "grant leave to amend 'freely,'" suggesting that she could have cured the deficiencies through amendment, Pet. at 30-31; and (ii) conflicts with *In re Kauffman Mutual Fund Actions*,

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12. Contrary to Petitioner's suggestion that the Ninth Circuit's decision to dismiss with prejudice was *sua sponte*, the Moving Issuers and the Underwriters argued that amendment of the complaint would be futile. *See Moving Issuers-Appellees' Principal Brief* at 1 ("re-filing would be futile because the District Court specifically held that Simmonds could not serve demand letters while these actions were pending"); *see also Underwriter Defendants-Appellees-Cross-Appellants' Reply Brief* at 7-9 (all 54 claims should be dismissed with prejudice because petitioner failed to demonstrate how defects in her pre-suit demands could be remedied by granting leave to amend); *Underwriter Defendants-Appellees-Cross-Appellants' Brief* at 55 ("if the Court affirms the District Court's decision – either on statute of limitations grounds or on any other alternative grounds presented – it should convert the without prejudice dismissals to with prejudice dismissals").

479 F.2d 257 (1st Cir. 1973), one of the very cases upon which the Ninth Circuit relied in converting the dismissal to "with prejudice." Pet. at 31-32. Petitioner is wrong on both counts.

First, the Ninth Circuit noted that it has "previously held that a complaint may be dismissed with prejudice on account of the plaintiff's failure to satisfy the demand requirement, . . . and various other circuits have reached the same conclusion. . . . [The] decision to convert the dismissal is not unprecedented." Pet. App. at 70a. Other than *Kauffman*, discussed below, Petitioner ignores the numerous cases cited by the Ninth Circuit – all of which are in the demand context and consistent with its holding.[13] Instead, Petitioner argues that the decision to dismiss her claims with prejudice conflicts with the general proposition that amendment be freely granted. But the cases she cites all recognize that leave to amend may be denied for a myriad of reasons, including where amendment of the complaint would be futile. Pet. at 30-31 (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962) (rejecting the "outright refusal to grant [ ] leave without any justifying reason,"

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13. *See* Pet. App. at 70a, 70a n.21 (citing *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 990-91 (9th Cir. 1999), *abrogated on other grounds by Tellabs, Inc. v. Makor Issues & Rights*, 551 U.S. 308, 322-24 (2007) (upholding dismissal without leave to amend where plaintiff failed to identify how deficiencies could be cured and where such amendment would be futile); *Kanter v. Barella*, 489 F.3d 170, 181 (3d Cir. 2007) (same); *Starrels v. First Nat'l Bank of Chicago*, 870 F.2d 1168, 1172 (7th Cir. 1989) (same); *Gaubert v. Fed. Home Loan Bank Bd.*, 863 F.2d 59, 69 (D.C. Cir. 1988) (same; citing *Foman v. Davis*, 371 U.S. 178, 182 (1962), for the proposition that such a dismissal is warranted where "the amendments would not serve any purpose")).

but noting amendment may be denied where it would be futile) and *Lopez v. Smith*, 203 F.3d 1122 (9th Cir. 2000) (reversing the denial of leave to amend on account of a mere technical error by a pro se plaintiff, but noting that court may dismiss with prejudice where defects cannot be cured through amendment)).

Here, dismissal with prejudice was appropriate because Petitioner cannot cure the deficiencies identified by the Ninth Circuit. The actual demand letters (as opposed to Petitioner's allegations regarding the content of the demand letters) were properly considered by the district court and reviewed by the Ninth Circuit, which characterized the contents of the demand and "follow-up" letters as "bearing no resemblance to the elaborate scheme described in Simmonds's complaint" and "completely fail[ing] to provide sufficiently detailed information to permit the boards to conduct a good faith inquiry," respectively.[14] Pet. App. at 61a-62a. Thus, Petitioner cannot amend her complaints to provide additional allegations relating to the content of the demand letters; the defects are in the demand letters themselves. Moreover, *Shlensky v. Dorsey*, a Third Circuit decision relied upon by the Ninth Circuit, specifically holds that an inadequate demand cannot be cured by serving a new demand letter after the filing of the complaint. 574 F.2d 131, 141-42 (3d Cir. 1978) (affirming dismissal without leave to amend). Indeed, the district court ruled that it would "not permit [Petitioner] to amend her demand letters while pursuing this action," as to do so after the suit

14. The Ninth Circuit reviewed the district court's dismissal for failure to comply with the demand requirements for abuse of discretion. Pet. App. at 48a.

had been initiated would reduce the demand requirement to a "meaningless formality." Pet. App. at 102a (citation omitted).

Second, despite Petitioner's attempt to manufacture a circuit split, the Ninth Circuit and the First Circuit in *Kauffman* both held that where the issue of demand has been litigated and further amendment would be futile, dismissal may be with prejudice as to that issue. Indeed, the First Circuit explained that "[t]he dismissal is *with prejudice* on the issue of the obligation to make a demand on the directors with respect to that substantive complaint," noting that the plaintiff "is precluded from relitigating the very question which was litigated in the prior action."[15] *Kauffman*, 479 F.2d at 267 (citations omitted) (emphasis added). Far from being in conflict with *Kauffman*, the Ninth Circuit specifically held that "[w]e agree with the First Circuit's approach in *Kauffman*. Simmonds is barred from relitigating issues relating to the adequacy of the demand letters. . . . As with any issue litigated fully on the merits, shareholders may not endlessly relitigate the adequacy of their pre-suit demand." Pet. App. at 71a. Because Petitioner provides no reason to justify this Court's review, the Petition should be denied.

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15. The First Circuit specifically noted that "[i]n affirming we must, however, comment upon one phrase in the order of the district court granting the motion to dismiss, that it is 'without prejudice.' This must mean without prejudice as to the substantive cause of action." *Kauffman*, 479 F.2d at 267.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition.

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